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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 TERRANCE D. RUTHERFORD,) Case No. CV 11-04433 DDP (MANx)
12)
13 Plaintiff,)
14) **ORDER GRANTING DEFENDANT ALASKA**
15 v.) **AIRLINES, INC.'S MOTION TO**
16) **DISMISS**
17 FIA CARD SERVICES, N.A.,)
18 ALASKA AIRLINES, INC.,)
19 HORIZON AIR INDUSTRIES,)
20 INC.,)
21) [Dkt. Nos. 21, 23, 35]
22 Defendants.)
23 _____)
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19 Presently before the court are two Motions to Dismiss. The
20 motion filed by Defendant FIA Card Services, N.A. ("FIA" or "Bank
21 of America") argues that, under Washington law, Plaintiff has
22 failed to allege the existence of a written contract, and thus his
23 claims are time-barred. (Dkt. No. 23). The other motion, filed by
24 Defendants Alaska Airlines, Inc. and Horizon Air Industries, Inc.
25 (collectively, "Alaska"), argues that as a matter of California
26 law, Plaintiff's claims must be dismissed. Having considered the
27 submissions of the parties, the court is inclined to grant Alaska's
28 motion and dismiss Plaintiff's complaint with leave to amend.

1 **I. Background**

2 Plaintiff, a resident of California, works for Alaska, whose
3 principal place of business is in Washington. (Complaint ¶¶ 5, 7-
4 8.) Alaska also does business in California. (Id. ¶ 11.)

5 Alaska entered into a marketing partnership with FIA, which is
6 organized under the laws of and has its principal place of business
7 in Delaware. (Id. ¶¶ 6,12.) As part of the marketing partnership,
8 FIA issues "Alaska Airlines" branded credit cards and makes
9 payments to Alaska. (Id. ¶¶ 12, 15.)

10 Defendants instituted a credit card incentive program ("the
11 Program"), under which Alaska employees were promised varying
12 levels of payment for submitting credit card applications that FIA
13 ultimately processed or approved.¹ (Id. ¶ 20.) Employees learned
14 the terms of the incentive program "through various means,"
15 including web sites, emails, flyers, and "representatives from
16 [FIA] and the airlines' liason to [FIA]." (Id. ¶ 17.)

17 Plaintiff alleges that these communications constitute a
18 contract, under which FIA is bound to pay Alaska employees for each
19 qualifying application. (Id. ¶¶ 24, 26.) Plaintiff began
20 submitting applications in March 2005. (Id. ¶ 5.) Plaintiff
21 alleges, however, that he has not been paid for the applications he
22 has submitted (Id. ¶ 37.) In 2007, for example, Plaintiff
23 submitted approximately 1,000 applications. (Id. ¶.) Though
24 approximately 509 applicants informed Plaintiff that their
25 applications were approved, Plaintiff never received payment for
26 submitting the applications. (Id.) On May 23, 2011, Plaintiff

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28 ¹ A "processed" application contains enough information to
allow FIA to approve or reject the application. (Complaint ¶ 20.)

1 filed the instant action, alleging causes of action for breach of
2 contract and unjust enrichment. Defendants now move to dismiss
3 both claims.

4 **II. Legal Standard**

5 A complaint will survive a motion to dismiss when it contains
6 "sufficient factual matter, accepted as true, to state a claim to
7 relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.
8 Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S.
9 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court
10 must "accept as true all allegations of material fact and must
11 construe those facts in the light most favorable to the plaintiff."
12 Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a
13 complaint need not include "detailed factual allegations," it must
14 offer "more than an unadorned, the-defendant-unlawfully-harmed-me
15 accusation." Iqbal, 129 S. Ct. at 1949. Conclusory allegations or
16 allegations that are no more than a statement of a legal conclusion
17 "are not entitled to the assumption of truth." Id. at 1950. In
18 other words, a pleading that merely offers "labels and
19 conclusions," a "formulaic recitation of the elements," or "naked
20 assertions" will not be sufficient to state a claim upon which
21 relief can be granted. Id. at 1949 (citations and internal
22 quotation marks omitted).

23 "When there are well-pleaded factual allegations, a court should
24 assume their veracity and then determine whether they plausibly
25 give rise to an entitlement of relief." Id. at 1950. Plaintiffs
26 must allege "plausible grounds to infer" that their claims rise
27 "above the speculative level." Twombly, 550 U.S. at 555-
28 56. "Determining whether a complaint states a plausible claim for

1 relief" is a "context-specific" task, "requiring the reviewing
2 court to draw on its judicial experience and common sense." Iqbal,
3 129 S. Ct. at 1950.

4 **III. Discussion**

5 This court, sitting in diversity, applies California's choice
6 of law rules to determine whether California or Washington law
7 applies. Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.,
8 622 F.3d 996, 1002 (9th Cir. 2010). California employs several
9 different choice of law analyses. See Arno v. Club Med Inc., 22
10 F.3d 1464, 1469 n. 6 (Noting conflict among California courts).
11 Some courts, applying a statutory test under California Civil Code
12 § 1646, look to the place of performance or contract formation.
13 See, e.g., Costco Wholesale Corp. v. Liberty Mutual Ins. Co., 472
14 F.Supp.2d 1183, 1197 (S.D. Cal. 2007).

15 Other courts have suggested, however, that California's modern
16 approach limits § 1646 analyses to matters of contract
17 interpretation, and that other choice of law questions are more
18 properly analyzed under a "governmental interests" analysis.
19 Frontier Oil Corp. v. RLI Ins. Co., 153 Cal.App.4th 1436, 1459-1460
20 (2007). Under the governmental interests analysis, the party
21 seeking to invoke foreign law must establish that 1) the foreign
22 law materially differs from California law, and 2) the
23 jurisdictions' interests in applying their own law truly conflict.
24 Pokorny v. Quixtar, Inc., 601 F.3d 987, 994-995 (9th Cir. 2010);
25 Washington Mutual Bank, FA v. Superior Court, 24 Cal.4th 906, 919
26 (2001). If there is a true conflict, the court must then weigh the
27 competing interests and apply the law of the state whose interest
28 stands to be most impaired. Id.

1 In instances where the parties have not made a choice of law,
2 as is the case here, some courts apply a third test, based on
3 Section 188 of the Restatement (Second), Conflict of Laws. See,
4 e.g. ABF Capital Corp. v. Berglass, 130 Cal.App.4th 825, 838
5 (2005). The Section 188 approach looks to the place of contract
6 formation, the place at which the contract was negotiated, the
7 place of performance, the location of the contract's subject
8 matter, and the location of the parties. Id.

9 Here, however, the omission of certain facts from Plaintiff's
10 complaint renders it difficult for this court to make a choice of
11 law determination, regardless of the test applied. The complaint
12 fails, for example, to specify whether the purported contract
13 alleged is written or oral. Furthermore, the complaint is vague as
14 to the parties to the purported contract.

15 Though Plaintiff argues that Alaska formed the contract in
16 Washington (Opposition at 14), his argument contradicts his
17 pleadings, which allege that FIA, a Delaware resident, made the
18 unilateral offer to contract. (Complaint at ¶ 41.) Indeed,
19 nowhere in his complaint does Plaintiff allege that Alaska is
20 itself a party to the purported contract. (Compl. ¶¶ 24 ("Bank of
21 America . . . is bound by the terms of the contract"), 26 ("Bank of
22 America is bound by the terms of a revised contract,"), 41 ("The
23 unilateral offer to contract made by Bank of America was issued to
24 Plaintiff.").) To the contrary, the complaint explicitly alleges
25 that Alaska is merely an "intended beneficiar[y] of the contract
26 between Bank of America and employees." (Compl. ¶ 56.)

27 In light of these deficiencies, Plaintiff's complaint is
28 dismissed, with leave to amend. Should the facts of Plaintiff's

1 amended complaint fail to resolve the choice of law dispute,
2 Defendants are free to seek a determination of applicable law from
3 this court.

4 **IV. Conclusion**

5 For the reasons stated above, Alaska's Motion to Dismiss is
6 GRANTED.² Any amended pleading shall be filed with fourteen days
7 of the date of this order.

8 IT IS SO ORDERED.

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11 Dated: March 23, 2012



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DEAN D. PREGERSON
United States District Judge

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28 ² FIA's Motion to Dismiss, brought on the basis of Washington
law, is denied without prejudice.